No. 83-245 and No. 83-291

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

PENSION BENEFIT GUARANTY CORPORATION, Appellant,

v.

R. A. GRAY & COMPANY, Appellee.

and

OREGON-WASHINGTON CARPENTERS-EMPLOYERS PENSION TRUST FUND, Appellant,

v.

R. A. GRAY & COMPANY, Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

# BRIEF FOR APPELLEE R. A. GRAY & COMPANY

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## QUESTION PRESENTED

Whether, when Congress enacted the Multiemployer Pension Plan Amendments Act of 1980, it violated the Due Process Clause of the Fifth Amendment by retroactively imposing a substantial new liability on employers who withdrew from multiemployer pension plans before the law's enactment and who, therefore, at the time they withdrew, had no notice of the new law's requirements and no opportunity to conform their conduct to its provisions?

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## SUPPLEMENTAL STATEMENT OF THE CASE

With the enactment of MPPAA, Congress created a completely new legislative scheme regulating withdrawal from multiemployer

plans.[1] Instead of requiring the PBGC to guarantee benefits for employees of terminated plans, as it had originally done in ERISA, Congress required the trustees of multiemployer plans to collect from withdrawing employers a "withdrawal liability" in addition to the contributions which those employers had made pursuant to

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[1] A multiemployer plan is specifically designed to accommodate changes in employer participants. While some employers may withdraw, and new employers may become contributors, the plan itself continues under the independent management of its trustees. Multiemployer plan funding operates on the principle that one employer's withdrawal will be offset by entry of others or by expansion of covered employment with existing contributors. H.R. Rep. No. 869, Pt. I, 96th Cong., 2d. Sess. (1980) *reprinted in* 1980 U.S. Code Cong. & Ad. News 2918, 2921-22.

In the present case the record shows that at the time of Gray's withdrawal the plan was actuarily sound and had been reducing its unfunded vested liability (see note 19, *infra*). The plan is in excellent financial health. Gray's withdrawal has not jeopardized its existence or the pension rights of its beneficiaries.

collective bargaining agreements.[2] The liability is calculated by the trustees, who choose one of several formulas based on an employer's past contributions to the plan and on the plan's unfunded vested liabilities at the time of withdrawal. 29 U.S.C. §§ 1381, 1382, 1391 (Supp. V 1981).

Withdrawal liability under the MPPAA differs drastically from termination liability in the case of single-employer plans (and from termination liability as originally envisioned for multiemployer plans under ERISA). It has the following significant features:

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[2]The change was made as the result of a PBGC study which, as described by the Ninth Circuit's opinion in this case, informed Congress that ERISA "*might* encourage termination of multiemployer pension plans," that employers "*might* choose to terminate their plans," that active employees "*might* also desire termination" under certain conditions, and that these factors taken together "*might* act as an incentive to plan termination." J.S. 17a (emphasis added).

1. Withdrawal liability payments are made directly to an ongoing plan instead of to the PBGC after a plan has terminated.

2. The withdrawal liability must be assessed by the plan's trustees whether or not the plan is likely to need the funds in order to pay vested benefits.

3. The plan's trustees are not required to use the withdrawal liability payments to reduce the plan's unfunded vested liabilities.

4. Withdrawal as defined by MPPAA includes both voluntary and involuntary actions by employers.

5. Withdrawal liability must be assessed against employers who had withdrawn during the five months before the MPPAA became law. This provision for retroactive application was held invalid by the United States Court of Appeals for the Ninth Circuit and is the provision which is at issue in this case.

Gray is one of the employers who were caught by the law's retroactive date. Gray is a construction company which, by 1980, had contributed to a multiemployer plan for 15 years pursuant to successive collective bargaining agreements. During those 15 years Gray had contributed $398,095 (J.A. 14). The plan's governing document provided that each individual employer's liability was limited to the contributions required by the collective bargaining agreement and that individual employers were not liable for the plan's debts (J.A. 117-18).

On February 14, 1980, more than seven months before MPPAA became law, Gray had given notice, as required by its collective bargaining agreement, that it intended to terminate that agreement (J.A. 19). The agreement expired on May 31, 1980 and negotiations in the meantime had not resulted in a new agreement (J.A. 159-61).

On June 2, 1980 the union began to picket Gray (J.A. 14). However, 63 percent of Gray's employees resigned from the union, and all of those who resigned crossed the picket line and continued to work for Gray (*id.*; J.A. 13). Thus the union lost majority status and its picketing, which continued for many months thereafter, was found to be informational only (J.A. 13; 144).

As of June 1, 1980, as a result of the above events, Gray was no longer obligated to contribute to the multiemployer pension plan. Almost four months later, on September 26, 1980, the MPPAA became law. Because the expiration of Gray's collective bargaining agreement constituted a withdrawal from the plan as defined by the MPPAA, 29 U.S.C. § 1383 (Supp. V 1981), the plan's trustees, as required by MPPAA, notified Gray that it had incurred a

withdrawal liability which the trustees calculated to be $201,359 (J.A. 9).

Gray, as a general contractor, analyzes its costs in order to bid competitively on projects. Labor costs are a significant factor in that analysis. In preparing such bids prior to the enactment of MPPAA, Gray had factored in its contractual cost of pension contributions. It had not factored in a cost for withdrawal liability, however, because no such liability existed (J.A. 14). If Gray had known that withdrawal from its pension plan would subject it to substantial additional liability, it would have considered various alternative courses of action by which it might have avoided incurring a withdrawal liability or would have included in its bids a cost factor to take that liability into account (*id.*).

The United States Court of Appeals for the Ninth Circuit, after carefully

examining the retroactive application of MPPAA's withdrawal liablity provisions to employers in Gray's position, held that those provisions violated Gray's right to due process of law. Therefore, the court did not have to consider Gray's other constitutional challenges to the MPPAA (J.S. 27a; J.A. 3-5).

SUMMARY OF ARGUMENT

One of the most important components of the concept of due process of law, as guaranteed by the Fifth Amendment to the United States Constitution, is that of notice at a time when notice is meaningful. As applied to new legislation, that means that individuals are entitled to be informed that certain conduct will have consequences in the future which differ from its consequences in the past. It also means that Congress must give that notice by following the Constitution's procedural requirements for the enactment of a law.

Congressional activity suggesting the *possibility* of a new law is not notice for due process purposes.

Like other constitutional guarantees, the due process guarantee of advance notice is not absolute. Special circumstances may justify substituting some other procedure in particular cases. But the special justification must be real and it must be specific.[3] It is not enough that Congress may have "rationally" wished to reach backward in time and apply the standards created by a new law to conduct that took place before that law existed. If that

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[3]The brief submitted by Amicus Curiae Republic Industries, Inc. contains additional discussion of the requirement that special or extraordinary justification be shown when Congress retroactively imposes substantial new duties or liabilities and thus fails to provide the meaningful notice which the Due Process Clause normally requires. Gray asks the Court to consider the arguments and authorities presented there, as well as those in this brief, as support for Gray's position.

justification would suffice, all new laws could be made retroactive. Individuals would have no protection at all against Congressional alteration of the consequences of closed transactions.

When considering the validity of the retroactive application of a law which imposes substantial new duties or liabilities, this Court has examined various factors and found a number of considerations to be significant. Among them are: (1) the likelihood that affected individuals made deliberate choices of action based on the existing legal situation; (2) the degree of correspondence between the new duty or liability and the harm or costs which it was intended to address; (3) the existence of legitimate expectations which were not being met under the prior law; and (4) the nature and weight of the public interest in having the

new law apply retroactively as well as prospectively.

The retroactive withdrawal liability provisions of the MPPAA deprived employers of the opportunity to plan for the consequences of conduct which was complete before the law's enactment. They exact substantial (and in some cases crippling) payments from employers for the purpose of avoiding a mere possibility of harm. If there are instances in which that harm is likely (rather than merely theoretically possible), the law's retroactive provisions exact payments from employers whose conduct may not be related to any danger which exists. They exact those payments although there could have been no legitimate expectations that any such payments would or should be made. And they are premised on inaccurate assumptions about the probable reasons for the employer's pre-enactment conduct.

The relationship between the MPPAA withdrawal liability provisions and the consequences of actions by employers to which they have been retroactively applied is indirect and speculative at best. That kind of indirect and speculative relationship cannot provide the necessary special justification for allowing Congress to dispense entirely with the meaningful notice which the Due Process Clause requires in all but unusual cases.

## ARGUMENT

I. <u>The Right To Due Process Of Law Means That, Unless Special Justification Is Shown, Individuals Are Entitled To Advance Notice That In The Future Specified Conduct Will Result In A Substantial New Duty Or Liability.</u>

The PBGC has characterized as the "central issue in this case" the question whether Congress may "rationally act" to

> ". . . discourage last-minute efforts to nullify

> the economic impact of legislation that is on the verge of enactment *by announcing that a pending bill, if enacted into law*, will take effect as of a date during the final stages of Congress' deliberation, and then incorporating that date into law." (PBGC Br. 35) [Emphasis added.]

That question must be answered "No."

The question appears to assume that if the Court determines that what Congress has attempted is "rational" it must uphold the retroactive provisions of MPPAA. *See also* PBGC Br. 21-22, 28. That assumption is wrong. "Rationality" is not the touchstone here. If it were, Congress could make every statute retroactive on the theory that retroactive application was a rational way of insuring that a new law had maximum effect.

The crucial question is not whether what Congress has attempted is rational in the sense that it could serve Congress's apparent purpose. The crucial question is: *how does Congress act?* The PBGC assumes

that Congress may act by "announcing" its intentions as to future legislation. Congress does not legislate by announcement. Article I of the United States Constitution prescribes certain minimum steps essential to legislation. Both full houses of Congress and the President must participate in the enactment of law.[4] *Immigration and Naturalization Service v. Chadha*, ___ U.S. ___, 103 S. Ct. 2764, 2787 (1983). *See also American Federation of Gov. Employees v. Pierce*, 697 F.2d 303, 306

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[4]Art. I, § 1 provides:

> "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives."

Art. I, § 7 provides in clause 2:

> "Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States . . ."

*See also* Art. I, § 7, cl. 3.

(D.C. Cir. 1982) (Congress may not legislate through action by committee of each house).

The minimum legislative steps required by Article I are designed to "protect the people from the improvident exercise of power" and to "assure that both Houses of Congress and the President participate in the exercise of lawmaking authority." *Immigration and Naturalization Service v. Chadha, supra*, 103 S. Ct. at 2787-88 and n. 22. They represent "hard choices" which were "consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked." *Id.* at 2788. They do not allow for shortcuts.[5] Both houses of

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[5]The fact that a procedure adopted by Congress is "efficient, convenient and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *Immigration and Naturalization Service v. Chadha, supra*, 103 S. Ct. at 2780-81.

Congress must "concur in the enactment of positive law that alters individuals' substantive rights." *Chadha v. Immigration and Naturalization Service*, 634 F.2d 408, 434 (9th Cir. 1980), *reh. denied* (1981), *aff'd Immigration and Naturalization Service v. Chadha*, ___ U.S. ___, 103 S. Ct. 2764 (1983).

If the right to due process of law has any meaning at all as a protection against improper legislative action, it must include, at a minimum, a requirement that Congress employ the very procedures which the Constitution makes essential to the enactment of legislation. Any argument that liabilities may be imposed retroactively because Congress has "announced"[6]

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[6]The announcement upon which PBGC relies was not the result of action by Congress as a whole. Neither house of Congress even considered the MPPAA until May 22, 1980. Prior to that date the only "announcements" were introduction of the

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that it might do so in the future is based on mistaken premises about our basic system of government. *Congress has no power to require citizens to conform their conduct*

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[6](continued) bill and committee proceedings. The two houses of Congress did not agree on the MPPAA in its final form until September 19, 1980. 1980 U.S. Code Cong. & Ad. News 2918.

PBGC suggests that Gray should have devined from media coverage that new withdrawal liability would be enacted and would operate retroactively (PBGC Br. 35-36 n. 33). It has attempted to support that suggestion by attaching to its brief a newspaper article reporting that the House Committee on Education and Labor had approved a bill containing one retroactive provision, that the House Ways and Means Committee had approved a bill containing entirely different retroactive provisions, that the full House had not yet acted, and that "a similar measure is working its way through the Senate" (PBGC Br. 6a). It has also attached to its brief a wire service release dated a month later reporting that as of April 29, 1980 the Senate Finance Committee had determined that PBGC's mandatory insurance of multiemployer plan benefits should be delayed until July 1 and that changes in ERISA's "guarantee provisions" should be made retroactive (PBGC Br. 7a). Anyone noting these successive news reports could only have concluded that ultimate Congressional action, and the form it might take, were totally uncertain.

*to standards contained in a bill which may or may not become law.* When it takes action with the "purpose and effect of altering the legal rights, duties and relations of persons," it must do so by legislating. *Immigration and Naturalization Service v. Chadha, supra,* 103 S. Ct. at 2784.

This Court has clearly rejected the argument made by the PBGC. In *Untermyer v. Anderson,* 276 U.S. 440, 445-46 (1928), it stated unambiguously that citizens

> ". . . cannot foresee and ought not to be required to guess the outcome of pending measures. The future of every bill while before Congress is necessarily uncertain. The will of the lawmakers is not definitely expressed until final action thereon has been taken."

Two important concepts are inherent in that passage. The first is that until the legislative process is complete there is no law, and that individuals cannot be held to

standards which do not yet exist.[7] The second is that for due process purposes

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[7]A contrary rule would not only be unconstitutional but unworkable. At what point in the legislative process would citizens be held to constructive notice that their rights and liabilities were to be retroactively altered in the future? At the time a bill was introduced? When one Congressional committee acted favorably on a bill? Two committees? And which version of proposed legislation would provide that notice? The Senate version of the MPPAA was changed in 335 particulars in the 30 days prior to July 29, 1980. 126 Cong. Rec. S10167 (daily ed. July 29, 1980) (remarks of Sen. Armstrong).

On occasion this Court has suggested that the pre-enactment legislative process can provide constructive notice of the probable retroactive effects of legislation. It has done so, however, only in cases involving the kinds of changes in tax laws which have been consistently upheld on other grounds without resort to concepts of constructive notice. *United States v. Darusmont*, 449 U.S. 292 (1981); *United States v. Hudson*, 299 U.S. 498, 501 (1937).

Moreover, the Court has carefully distinguished such cases from those in which retroactive imposition of an entirely new kind of liability which could not have been anticipated was held invalid: *United States v. Darusmont, supra*, 449 U.S. at 299; *Welch v. Henry*, 305 U.S. 134, 147, *reh. denied* 305 U.S. 675 (1938).

citizens are entitled to notice of what legal consequences of a course of conduct are, not what they may possibly become, and to an opportunity to conform their conduct to the requirements of new legislation.

A very recent decision has recognized the importance of that notice and opportunity:

> ". . . Generally, a legislature need do nothing more than enact and publish the law, and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply. In this case, *the two-year grace period* included in the Indiana statute forecloses any argument that the statute is invalid because mineral owners may not have an opportunity to become familiar with its terms. . . .." *Texaco, Inc. v. Short*, 454 U.S. 516, 102 S. Ct. 781, 793 (1982). [Emphasis added.]

If, as *Texaco* suggests, the mere enactment of a law may not provide sufficient notice if it does not give the citizen adequate opportunity to plan or to conform his post-enactment behavior to the law's new requirements, surely special justification

must be advanced to permit retroactive application of a statute which alters the consequences of pre-enactment behavior.

In *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, *reh. denied* 439 U.S. 886 (1978), one of the vices which this Court identified in a state statute which was invalid under the Contract Clause was that it took effect the day *after* its passage, without any provision for gradual applicability or grace periods. The lower court had improperly

> ". . . rejected out of hand the argument that employers were constitutionally entitled to some grace period to adjust their pension planning." 438 U.S. at 249, n. 23.[8]

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[8]Principles and considerations relevant to an examination of legislation under the Contract Clause are also relevant to a due process analysis. In *Veix v. Sixth Ward Building & Loan Ass'n of Newark, N.J.*, 310 U.S. 32 (1940), this Court, considering constitutional challenges to a state statute, held that it did not violate the Contract Clause and, having so held, stated

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And, in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15-16 (1976), the court was careful to point out that although the Black Lung Benefits Act of 1972 "has some retrospective effect," it nevertheless imposed no new liability until 1974, two years after its passage.

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[8](continued) that separate consideration of the legislation under the due process clause of the Fourteenth Amendment was "wholly unnecessary." 309 U.S. at 41. Similarly, in *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 448 (1934), having determined that a state statute did not violate the Contract Clause, the Court held that its discussion of that subject "is also applicable to the contention presented under the due process clause." *See also Thorpe v. Housing Authority of City of Durham*, 393 U.S. 268, 278, n. 31 (1969):

> "Although the constitutional prohibition of the impairment of contracts, U.S. Const., Art. 1, § 10, applies only to the States, we have held that '[v]alid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment.' *Lynch v. United States*, 292 U.S. 571, 579 (1934)."

If a retroactive law is to be held valid, it cannot be simply on the ground that pre-enactment activity by Congress provided constructive notice of possible future changes in the governing standards, nor can it be enough that there is some "rational" connection between a retroactive effective date and Congress's desire to make a new law as effective as possible. If retroactive legislation were upheld on those grounds, there would be no limit to Congress's power to attach new consequences to past actions. Citizens could never be confident that closed transactions were truly closed, nor could they plan their activities with any assurance on the basis of today's legal rights and responsibilities. Tomorrow's legislation could reach back and erase the premises upon which those plans were based.

The authors of the Constitution labored to protect citizens from just such

capricious actions by their government and especially by the legislature.[9] The constitution's procedural requirements and the right to due process of law mean that citizens are entitled to know what the governing law is *at a time when that knowledge means something*.

To be sure, this Court has held that new laws are not invalid simply because they disturb some previously settled expectations.[10] It has never held that Congress is totally without power to pass laws that have retroactive effects. It *has* held, however, that when Congress creates a new liability based on past acts or closed transactions, the retroactive application of the law must be separately justified; a

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[9] *See Chadha v. Immigration and Naturalization Service*, *supra*, 634 F.2d at 433-34, collecting citations to contemporary sources.

[10] *See Usery v. Turner Elkhorn Mining Co.*, *supra*, 428 U.S. at 16.

justification which is adequate for prospective action will not necessarily suffice to justify the same action applied retroactively. *Usery v. Turner Elkhorn Mining Co., supra*, 428 U.S. at 16-17.

New legislation may have many different kinds of retroactive effects, even when it is prospective in application. Perhaps no single standard for testing the constitutionality of statutes which are retroactive in either application or effect could be created. This Court has not formulated one.[11] It has rarely confronted

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[11] It has stated that retrospective legislation is not generally prohibited by the Due Process Clause unless the consequences are particularly "harsh and oppressive." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 17, n. 13 (1977), citing *Welch v. Henry*, 305 U.S. 134, 147 (1938).

Whether or not the operation of a retroactive statute is "harsh and oppressive" can only be determined by examining the impact of the law, the nature and weight of the purposes it was intended to

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legislative attempts to create retroactively an entirely new liability triggered by pre-enactment conduct comparable to the statute at issue in this case. When faced with such a statute in the past, it has held the law's retroactive application unconstitutional, as in *Railroad Retirement Board v. Alton R. Co.*, 295 U.S. 330 (1935) and *Untermyer v. Anderson*, *supra*. Even when a statute was prospective in application, the Court has held it invalid if its retroactive effects were harsh, *Allied Structural Steel Co. v. Spannaus*, *supra*, or upheld it only after finding a special justification.

For example, in *Usery v. Turner Elkhorn Mining Co.*, *supra*, the retroactive effects of the Black Lung Benefits Act were

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[11] (continued) serve, and the need for retroactivity in order to serve those purposes.

approved because (1) the mine operators had been aware of the disease and its dangers for at least 20 years; (2) the operators did not contend that they would have taken greater precautions to protect their employees if the law had imposed liability at the time; (3) there was a direct relationship between actual damage (disability resulting from the operators' former employees' work in the mines) and the liability imposed on individual employers; and (4) under the new law the government, not the mine operators, would be responsible for providing most of the benefits during the early years of the law's operation.

The first two factors alone would probably not have sufficed.[12] The direct

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[12] ". . . we would nevertheless hesitate to approve the retrospective imposition of liability on any theory of deterrence . . . or blameworthiness . . . ." 428 U.S. at 17-18. [Citations omitted.]

relationship between each employer's liability and the actual injury to its former employees was especially important:

> ". . . the point of the black lung benefit provisions is not simply to increase or supplement a former employee's salary to meet his generalized need for funds. Rather, the purpose of the Act is to satisfy a specific need created by the dangerous conditions under which the former employee labored -- to allocate to the mine operator an actual, measurable cost of his business." 428 U.S. at 19.

Different kinds of retroactive legislation have called for different kinds of justification. Retroactive changes in the tax laws, when they did not go so far as to create an entirely new and unanticipated kind of liability, have been upheld on the special ground that they are a means of allocating among citizens the ongoing costs of government. *United States v. Darusmont,*

449 U.S. 292, 298, (1982).[13] Objections to retroactive *effects* of a new law have been rejected when it appeared that the complaining party had voluntarily acquired property which was already regulated "in the particular" to which he later objected. *Veix v. Sixth Ward Building & Loan Assn. of Newark, N.J.*, 310 U.S. 32, 38 (1940). And the Court held that a 1954 change in the National Housing Act could constitutionally be applied to property which had been insured under the Act since 1949, where the change was merely a clarification of prior law and imposed no penalty or liability for any actions taken prior to its enactment. *Federal Housing Administration v. Darlington, Inc.*, 358 U.S. 84 (1958) *reh. denied* 358 U.S. 937 (1959). The

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[13] Changes in the gift tax laws which retroactively created an entirely new and unanticipated liability have been held invalid. See *Welch v. Henry, supra*, n. 7, 305 U.S. at 147 (collecting cases).

considerations which led the Court to uphold those laws do not exist in this case. MPPAA's retroactive creation of a substantial new liability poses a different kind of problem.

A law which directly and retroactively imposes a new liability for past acts is one which, by its very nature, provides no notice in the constitutional sense. If it is to be upheld, it must be because there is special justification for dispensing with notice.

In analogous settings, the Court tests the adequacy of notice of judicial proceedings by identifying and weighing the relevant factors.[14] Similarly, when testing the adequacy of a law's provision for a hearing in connection with governmental deprivation of liberty or property, it

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[14]*See, e.g., Mennonite Bd. of Missions v. Adams*, ___ U.S. ___, 103 S. Ct. 2706, 2711-12 (1983); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

balances the relevant factors.[15] In other words, the Court examines the process the legislature has provided in particular cases to determine whether a specific form of procedure is justified in light of the circumstances and interests involved.

When Congress has dispensed entirely with notice and the opportunity to conform one's conduct to the standards created by a new law, and has attached a new liability to pre-enactment conduct, this Court should require a special and particularized showing of justification for such a departure from the procedures which normally constitute due process of law.

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[15] *See, e.g.*, *Fuentes v. Shevin*, 407 U.S. 67, 90-91, *reh. denied* 409 U.S. 902 (1972) (postponement of hearing until after taking must be justified by extraordinary circumstances); *Goss v. Lopez*, 419 U.S. 565 (1975) (requiring at least informal hearing before suspension of high school student).

## II. Congress Was Not Justified In Dispensing With The Notice Normally Required By The Due Process Clause And Imposing Retroactively Liability Based On Prior Withdrawals.

In prior cases in which the retroactive effect or application of a new law was challenged, this Court has examined various kinds of circumstances and considerations.[16] The following discussion of

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[16]The Ninth Circuit adopted the analysis employed in *Nachman Corp. v. Pension Ben. Guaranty Corp.*, 592 F.2d 947 (7th Cir. 1979), *cert. denied on constitutional grounds*, 442 U.S. 940 (1979), *aff'd on statutory grounds*, 446 U.S. 359, *reh. denied* 448 U.S. 908 (1980). In that case the Seventh Circuit, when considering the validity of a prospective law with some retroactive effects, identified and examined four relevant factors. 592 F.2d at 960. This Court has quoted at length and with apparent approval from that analysis, 446 U.S. at 367, n. 12, but has not expressly adopted it.

Whether or not the *Nachman* analysis is appropriate in the setting in which it was created, it should not limit the Court's examination of the validity of a law which

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the MPPAA's withdrawal liability provisions is organized to correspond to some of the considerations which this Court has found to be significant.

1. <u>The Change In The Law Not Only Upset Settled Expectations But Also Altered The Consequences Of Deliberate Choices Made In The Past By Attaching Unanticipated New Duties Or Liabilities.</u>[17]

A multiemployer plan is one to which an employer is obligated to contrib-

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[16](continued) is retroactive not only in some of its effects but also in its direct application. The ultimate question is not whether the *Nachman* test is satisfied, but whether there was adequate special justification for Congress to dispense with meaningful notice.

[17]*See, e.g., Usery v. Turner Elkhorn Mining Co., supra*, 428 U.S. at 17, n. 16:

> "Whether or not a person who could have anticipated the potential liability attaching to

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ute by virtue of a collective bargaining agreement. 29 U.S.C. § 1301(a)(3)(B) (Supp. V 1981). When negotiating such an agreement, an employer must take into account all of its labor costs, including its pension contributions. Proposed total compensation rates which differ by only a few cents per hour may be the subject of

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[17](continued)

his chosen course of conduct would have avoided the liability by altering his conduct has been significant in at least one line of cases in this Court. In *Welch v. Henry*, 305 U.S. 134 (1938), the Court upheld against a due process attack a state statute enacted in 1935 taxing 1933 dividend income that the 1933 statute had explicitly exempted. Adopting the view that a stockholder would have continued to receive corporate dividends even if he knew that the dividends would subsequently be taxed, the Court distinguished prior cases invalidating the retroactive taxation of gifts on the ground that the donor might have refrained from making the gift had he anticipated the tax. . . ."

intense and difficult bargaining, or even the cause of inability to reach agreement. The pension plan involved in this case, like most others, provided that Gray's liability with respect to the plan would be "limited to the contributions required by the Collective Bargaining Agreement . . ." (J.A. 117-18).[18] Having negotiated and executed the collective bargaining agreement, Gray relied on its provisions, including the agreed-upon pension contributions, when bidding on construction jobs (J.A. 14). It had no reason to

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[18] The District Court in this case mistakenly concluded that because the plan provision limiting Gray's obligations for contributions to those required by its collective bargaining agreement contained the words "except for liabilities which may result from provisions of ERISA," the imposition of new liabilities was contemplated by the plan itself (J.S. 39a-40a). The plan language says nothing about *changes* in ERISA. It simply recognizes that *existing provisions* of ERISA might require additional contributions if the plan is terminated.

include in its planning any cost factor for additional pension plan contributions in the event it could not reach agreement with the union on a new collective bargaining agreement. *Id.*

Under the provisions of ERISA before its amendment by MPPAA, withdrawal from the plan would not have resulted in any liability for Gray. Before the MPPAA, employers who withdrew might become liable later, but only if the plan terminated within five years, and then only in an amount up to 30 percent of their net worth. 29 U.S.C. §§ 1362, 1364 (1976). Certain employer participants, defined by ERISA as "substantial employers," could be required at the time of withdrawal to post security against the possibility of such future liability, but that provision did not apply to Gray. 29 U.S.C. § 1363 (1976); Ex. B to Affidavit of Thomas M. Triplett, filed April 7, 1982, p. 61.

At the time of Gray's withdrawal from its plan, there was no reason at all to believe that the plan might terminate within five years. It was actuarily sound at the time and its position had been improving in recent years.[19] Its actuarial position was, moreover, based on assumptions which would probably be overly

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[19] Ex. A to Affidavit of Thomas M. Triplett, filed April 7, 1982, p. 16; *id.*, Ex. B, p. 75. On April 29, 1983 Gray filed with the United States Court of Appeals for the Ninth Circuit a Motion for Permission to Supplement the Record or, in the Alternative, for Temporary Remand for Consideration of Additional Evidence. That motion was supported by an affidavit by Gray's counsel, with accompanying exhibits, showing that on April 19, 1983 attorneys for the Trust had informed him that as of that date the plan from which Gray had withdrawn no longer had any unfunded vested liability. The Ninth Circuit issued its decision in Gray's favor on May 20, 1983 without having ruled on that motion. It was subsequently denied by order dated June 27, 1983.

conservative in the event of actual termination.[20]

The change in employer liability made by the MPPAA was profound. Instead of a merely theoretical possibility of a future limited liability to PBGC, the consequences which the law attached to Gray's withdrawal at the time it occurred, MPPAA imposed after the fact an absolute liability to the pension fund without regard to Gray's ability to pay. The amount assessed by the plan's trustees was $201,359, an amount nearly equal to Gray's pension contributions during the prior five years under a collective bargaining agreement in spite of the plan provision which limited its liability to those payments alone. (J.A. 14).

There is no question that the retroactive application of MPPAA to Gray

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[20]Ex. B to Affidavit of Thomas M. Triplett, filed April 7, 1982, p. 75.

worked a substantial unanticipated change, to Gray's detriment, in the consequences of Gray's completed business decisions and transactions.

2. The New Liability Which Has Been Retroactively Imposed Is Not Based On Actual Harm Caused Or Costs Generated In The Past.[21]

It has been argued that the withdrawal liability imposed by MPPAA can be justified by the need to assure employers that if they join an existing multiemployer plan they will not be inheriting vast liabilities created by others, and to insure that withdrawing employers actually contribute to the funding of obligations they helped to create. In fact, however, employers did not create the obligations for which they are assessed under MPPAA.

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[21]*See, e.g.*, *Usery v. Turner Elkhorn Mining Co.*, *supra*, 428 U.S. at 19, quoted at p. 28, *supra*.

Unfunded vested liability can result from factors which are not attributable to the activities of any employer. The plan's benefit levels are set by its trustees, whose duty is to the plan's beneficiaries, not to its contributing employers. ERISA itself, by imposing new unbargained-for vesting requirements, increased the unfunded vested liability of many plans. A plan's trustees may have provided benefit credits to employees for past service for which no contributions at all were received. The actuarial assumptions which result in the calculation of unfunded vested liability may be revised. The plan's assets can be affected by the trustees' investment decisions or by general economic fluctuations. See *Republic Industries v. Teamsters Joint Council*, 718 F.2d 628, 632 n. 1 (4th Cir. 1983).

Because a multiemployer plan is specifically designed to accommodate changes in employer participants, it may well be "impossible to trace the unfunded liability attributable to each employer." 126 Cong. Rec. S10103 (daily ed. July 29, 1980) (remarks of Sen. Dole). And MPPAA does not correlate a plan's unfunded vested liability with burdens attributable to, or the liability imposed on, an employer who withdraws.

To take one example, the MPPAA statutory formulas base an employer's withdrawal liability on its contributions during the five years prior to withdrawal. 29 U.S.C. § 1391 (Supp. V 1981). However, an employee's right to benefits need not vest until he has completed *ten* years of service. 29 U.S.C. § 1053 (1976). Withdrawal by an employer who has contributed to a plan for less than ten years can thus provide the plan with a

substantial windfall based on contributions alone. Since its employees' rights have not vested, the plan has incurred no liability to them and has inherited the employer's contributions free of obligation. When such an employer withdraws from the plan, it will be required to contribute an additional windfall in the form of a withdrawal liability.

Moreover, although withdrawal liability is calculated by formulas based on a plan's unfunded vested liabilities and is assessed because of the possibility that a plan may terminate with such unfunded liabilities and thus be unable to pay promised benefits, MPPAA contains no requirement that withdrawal liability payments actually be used to reduce the plan's unfunded vested liability. There is a substantial likelihood that they will not.

As fiduciaries, plan trustees have a duty to preserve the financial security of the fund; they also have a duty to apply the assets of the fund for the benefit of the employees to the greatest extent possible. *Adams v. N.J. Brewery Emp. Pen. Trust Fund, Etc.*, 670 F.2d 387, 397, *reh. denied* (3d Cir. 1982). Because those two duties may conflict, the trustees have a broad discretion to act. *Id.* In doing so, however, they must act *solely* on behalf of the beneficiaries. *N.L.R.B. v. Amax Coal Co.*, 453 U.S. 322 *reh. denied* (1981). Their duty to the plan's beneficiaries "must overcome any loyalty to the interest" of the parties who appointed them. *Id.*

MPPAA requires that withdrawal liability be assessed whether or not the plan needs the funds to remain actuarily sound. If a plan is financially healthy, it would be perfectly consistent with the trustees' fiduciary duties to apply

withdrawal liability payments to providing greater benefits rather than to reducing the level of unfunded liability. The trustees' fiduciary duty to act solely in the interest of the beneficiaries may even require them to do just that.

MPPAA, in other words, requires additional contributions to multiemployer plans from employers who have already contributed the amounts they had bargained for, and does so whether or not there is a relationship between those employers' activities and a danger that the plan's beneficiaries would otherwise not receive their pensions. Indeed, it requires those contributions whether or not that danger exists at all.

3. The Beneficiaries Of The Change In The Law Had No Legitimate Expectations Which The Old Law Failed To Meet.[22]

Although employer contributions to multiemployer plans are determined by collective bargaining agreements, vesting requirements and benefit levels are not. Vesting requirements have been governed by ERISA since 1976. 29 U.S.C. § 1061(b) (1976). Benefit levels are determined by the plan's trustees, and do not depend on

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[22] *Allied Structural Steel Co. v. Spannaus*, *supra*, 438 U.S. 246, n. 18:

> ". . . Here, the company had relied upon the funding obligation of the pension plan for more than a decade. There was no showing of reliance to the contrary by its employees. Indeed, Minnesota did not act to protect any employee reliance interest demonstrated on the record. Instead it compelled the employer to exceed bargained-for expectations and nullified an express term of the pension plan."

the contribution rates of individual employers. It is the plan, not the employer, which has promised to pay a defined level of benefits. Although employees have a right to rely on an employer's collectively-bargained promise to make the agreed contributions, they have no legitimate right to rely on the employer to fund benefits promised by someone else.

The Ninth Circuit's analysis of the situation in this case is both succinct and entirely correct:

> "Employees expecting benefits under their multiemployer plans have an interest in the financial health of their plans. Their interest, however, goes more toward the solvency of the multiemployer plan as a whole than toward the individual contributions of a single employer, and this does not necessarily translate into a justified reliance interest in any single employer's withdrawal liability. There is no reason to believe that employees significantly relied for the financial health of the multiemployer plans on the increased termination liability imposed by the Amendments Act on

> those employers who withdrew between the effective date of the Act and the date of enactment. . . ." J.S. 19a-20a.

The Ninth Circuit's analysis of the employees' expectations applies with at least equal force to the plan's trustees. Just as Gray could not have known until the MPPAA was enacted that it would face any withdrawal liability, or the extent of that liability, so the plan's trustees could not have reasonably anticipated that the plan would receive additional payments from withdrawing employers who had made their agreed-upon contributions. The trustees' legitimate expectations, like those of the employees, were defined by the applicable collective bargaining agreements and by the pre-amendment provisions of ERISA which provided for employer liability to PBGC only in the event the plan terminated.

From the record in this case it appears that the trustees of Gray's plan were conducting its affairs on the basis of

those legitimate expectations. During the period covered by that record, the plan was actuarily sound without provision for withdrawal liability, and its financial health has steadily improved.

With respect to the expectations of other contributing employers (*see* PBGC Br. 33, n. 29), the situation is the same. Other employer participants in the plan, which limited each employer's liability to the contributions required by the collective bargaining agreement, must have been aware of the premises on which the plan was based:

> ". . . The multiemployer character of the fund permits employees to accumulate pension credits even while shifting employment from one employer to another, and protects their pension rights from being lost by the 'withdrawal' of any particular employer. The multiemployer character of the fund also protects the solvency of the fund because the impact on the fund from the 'withdrawal' of any particular employer is minimized; and when new entrants take the place of withdrawing

> employers, the pool is replenished." *Republic Industries v. Teamsters Joint Council*, 718 F.2d 628, 632, n. 1 (4th Cir. 1983).

Retroactive application of the MPPAA's withdrawal liability provisions would not disappoint the legitimate expectations of any party.

4. <u>The Asserted Special Interest In Having The New Law Operate Retroactively Is Not Adequate.</u>[23]

PBGC would justify the retroactive effective date for the withdrawal liability provisions of the MPPAA by a perceived need to deter "opportunistic" employers from withdrawing from multiemployer plans while Congress was debating whether to enact new

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[23] *See, e.g., Lichter v. United States*, 334 U.S. 742 (1948) (Congress's exercise of war power during national emergency); *United States Trust Co. v. New Jersey*, 431 U.S. 1, 29 (1977) (retroactive repeal of statutory covenant could be sustained only if resulting impairment of contract "was both reasonable and necessary to serve the admittedly important purposes claimed by the State").

legislation (*see* PBGC Br. 21, 29, 30-31, 33). The underlying assumptions are that withdrawal is a matter within the employer's control and that unless deterred a significant number of employers would have promptly and deliberately withdrawn to avoid the possibility of withdrawal liability. However, neither the fact nor the timing of withdrawal is in the employer's hands alone.

Withdrawal from a multiemployer plan occurs when an employer ceases to have an obligation to contribute under the plan. 29 U.S.C. § 1383 (Supp. V 1981). An obligation to contribute can exist only by virtue of a collective bargaining agreement. 29 U.S.C. § 1301(a)(3)(B) (Supp. V 1981). The employer cannot renew such an agreement if the union no longer represents a majority of its employees. *See, e.g.*, 29 U.S.C. §§ 159(c)(1)(A)(ii), 159(c)(1)(B) (1976); *International Ladies'*

*Garment Wkrs. U. v. N.L.R.B.*, 366 U.S. 731 (1961) (good faith belief that union represents a majority will not suffice); *N.L.R.B. v. Midtown Service Co.*, 425 F.2d 665 (2d Cir. 1970); *United States Gypsum Co.*, 157 N.L.R.B. 652, 61 L.R.R.M. 1384 (1966). Thus action by employees, against the employer's wishes, can cause a withdrawal from the plan. An employer cannot interfere without committing an unfair labor practice. 29 U.S.C. § 158(a) (1976).

Threats of liability aimed at the employer cannot prevent such a withdrawal. Aided by the enactment of MPPAA, a union can threaten to abandon representation rather than enter a renewal collective bargaining agreement. If that threat is carried out, the employer will have been

forced into a withdrawal, and will be subjected to withdrawal liability.[24]

Withdrawal, moreover, does not happen overnight. Collective bargaining agreements usually require substantial advance notice of either party's intention not to renew and, if neither the employer nor the union gives such notice, the agreement (and the obligation) continue in existence for another contract period.

Typically, collective bargaining agreements have a term of three years. An employer who was inclined to be "opportunistic" could not have withdrawn from a plan by terminating such a collective bargaining agreement when passage of the MPPAA seemed likely unless,

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[24]The threat itself is a new weapon placed in labor's hands by MPPAA. It can be used during bargaining to exact concessions from employers who would be faced with large withdrawal liabilities if negotiations reach an impasse.

by chance, that had happened to be near the end of a three-year contract period.

Moreover, termination of the agreement does not, of itself, accomplish a withdrawal. The employer remains obligated to contribute to the pension plan unless and until the union loses majority status (see p. 50, *supra*) or negotiations for a new contract (which the employer must conduct in good faith) have reached an impasse. *See, e.g., Hinson v. N.L.R.B.*, 428 F.2d 133 (8th Cir. 1970).

In Gray's case the agreement required 60 days' written notice (J.A. 16). Gray gave that notice on February 14, 1980 (J.A. 19). From that date forward, Gray was committed to either reaching agreement with the union on a new collective bargaining agreement or withdrawing from the pension plan. On that date the proposed MPPAA had not even been reported

out of a Congressional committee. *See* 1980 U.S. Code Cong. & Ad. News 2918.

Gray's experience does not appear to be unusual. Other employers have also been trapped by the retroactive application of withdrawal liability. In the cases heard and decided with this one, the Ninth Circuit's opinion discloses that Shelter Framing's collective bargaining agreement expired on July 1, 1980 and it was not able to reach a new agreement with its employees' union, and that G & R Roofing's withdrawal was the result of a similar sequence of events (J.S. 6a, 7a). In *Republic Industries v. Teamsters Joint Council*, 718 F.2d 628 (4th Cir. 1983), it appears from the court's opinion that the employer's withdrawal resulted from a termination of operations as a consequence of protracted operating losses. 718 F.2d at 632-33.

In *National Steel Service Center, Inc. v. Central States, Southeast and Southwest Areas Pension Fund*, No. 83-C-5315 (N.D. Ill., Nov. 23, 1983), *appeal docketed*, No. 83-3298 (7th Cir., Dec. 23, 1983), a retroactive withdrawal liability was assessed against an employer which, in a collective bargaining agreement executed in November of 1978, had agreed with its employees that, as of August 1, 1980, it would cease contributing to its multiemployer plan and would instead provide its own pension program. Its commitment to withdraw from the multiemployer plan was irrevocable long before the introduction in Congress of the bill which became the MPPAA. In *Pacific Iron & Metal Co. v. Western Conference of Teamsters Pension Trust Fund*, 553 F. Supp. 523 (W.D. Wash. 1982), *appeal docketed*, No. 82-3634 (9th Cir., Nov. 18, 1982), withdrawal occurred by virtue of expiration

of a collective bargaining agreement during the retroactive period after the employees had attempted to decertify the union and under circumstances which prompted the union to disclaim any interest in representing them.

These are hardly the actions of employers who, seeing the handwriting on the wall when it appeared likely that the full Congress soon would be acting on the MPPAA, leaped at the chance to escape potential new obligations. Rather, they are the actions of entities which, while going about their business and attempting to deal with the conditions confronting their enterprises, were caught by the happenstance of the dates of Congressional action and by Congress's general desire to

deter pre-enactment conduct which could not reasonably be deterred.[25]

Any proposed legislation which would create a new burden or liability may encourage some persons, whether through "opportunism" or prudence, to rearrange their affairs so as to escape the new burden should it actually come into being. If the desire to prevent such rearrangements were held sufficient to justify making the liability retroactive, Congress would have the power to freeze the status quo by the mere introduction of legislation. Every bill could contain a provision that if it were enacted its substantive changes would operate as of the

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[25] In fact, the February 27, 1979 retroactive effective date, as proposed in the original bill, was abandoned very late in the legislative process in order to exempt from withdrawal liability a number of employers "who were caught by the earlier date." 126 Cong. Rec. S10101 (daily ed. July 29, 1980) (remarks of Sen. Javits).

date of the bill's introduction (or any other date chosen by Congress during the pre-enactment process). Legislation itself could proceed at leisure while citizens would be forced, at their peril, to conduct their affairs based on predictions as to the outcome of the legislative process at some unknown time in the future.

## CONCLUSION

The withdrawal liability provisions of the MPPAA require employers to pay large sums of money to pension plans which have already received from those employers all of the contributions which they were required by law and contract to make. The new law imposes those substantial payments whether or not the pension plans need the funds to protect the rights of their beneficiaries and whether or not the employers' activities have been the cause of any need which may exist. Employers must pay those additional sums even though doing so may destroy their operations and put them out of business.

When Congress required those payments not only from employers who withdrew from their plans after the law's enactment but also from employers who had already done so before the law was passed, it cannot be argued that the burden it imposed was

anything but harsh. The question for the Court is whether Congress was justified in imposing that harsh burden without advance notice and an opportunity to plan for or conform to the law's new standards.

As shown above, the proposed justification for applying the law's new requirements to past conduct is totally inadequate. Without an adequate justification, the retroactive imposition of such substantial liabilities is not only harsh but, because it unreasonably deprives the employers of their constitutional right to notice of the requirements of new legislation, is unduly oppressive.

This Court should affirm the decision of the United States Court of Appeals for the Ninth Circuit, holding that the retroactive application of the MPPAA violated Gray's right to due process of law.

However, in the event that it does not affirm that decision, the Court should

remand the case to the Ninth Circuit for consideration of other issues which that court did not find it necessary to reach.

Respectfully submitted,

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